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No member of the United States Supreme Court has contributed more to establishing the doctrine of unconstitutional conditions in American law than Mr. Justice Brennan. Yet clearly the Justice did not devise or discover the doctrine. The sources of the doctrine remain, in fact, relatively obscure despite the scholarly attention recently devoted to its study and analysis.[1] The first articulation of the concept of unconstitutional conditions as a constraint on governmental authority came during the 1920s—or perhaps even earlier.[2] At first the evolution of the doctrine was unconscious, and therefore slow and tentative. Its application was, until quite recently, confined almost totally to state regulation of nonresident corporations seeking to expand the scope of their business activities.[3] The significant cases could be collected in a small pamphlet.

What Mr. Justice Brennan has done is to expand the doctrine and shift its focus from corporate interests to the rights and liberties of individuals who seek or receive government benefits. During his years on the Supreme Court he has continually reminded his colleagues of a most vital limitation on the excesses and abuses of governmental power. Through a long series of decisions, involving a broad range of government beneficiaries, Justice Brennan has articulated a set of basic principles which compose the modern doctrine of unconstitutional con-

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1. For general discussions of the background and development of the doctrine of unconstitutional conditions, see R. O'NEIL, THE PRICE OF DEPENDENCY 39-57 (1970); French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234 (1961); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

2. *See, e.g.*, Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926); Terral v. Burke Constr. Co., 257 U.S. 529 (1922).

3. *See* Comment, 117 U. PA. L. REV. 144, 145-51 (1968), for a thorough review of the older cases.

ditions. Under his guidance, we have come a very long way indeed from Mr. Justice Holmes' view that Officer McAuliffe "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[4] Today, within certain broad limits, one has a constitutional right to do both.[5]

A number of major Supreme Court decisions since 1956 are significant. There are two major cases, however, to which principal attention must be given, for they are the cornerstones of the doctrine. One is *Speiser v. Randall*,[6] coming quite early in Mr. Justice Brennan's term on the Court; the other is *Sherbert v. Verner*,[7] coming later in his career and reflecting the maturation of his views in this area. We must begin with the condition of the law as Justice Brennan assumed his seat on the Court to see how far we have come.

I. PRELUDE TO SPEISER

Mr. Justice Holmes disposed of Officer McAuliffe in 1892. Quaint though Holmes' views may sound today, they lingered far into the twentieth century. Incredibly, as late as 1952—sixty years after *McAuliffe*—the Supreme Court, in *Adler v. Board of Education*,[8] sustained the New York loyalty laws[9] with the callous comment that state employees who did not like disclaimer oaths were always "at liberty to retain their beliefs and associations and go elsewhere."[10] The underlying premises were that public employment (and a fortiori other types of government benefits) were "privileges" rather than "rights;" since government was not legally required to provide these benefits at all it could attach to the offer any conditons or restrictions it wished. The "greater" power to deny the benefit outright, in other words, presupposed the existence of a "lesser" power to restrict access or eligibility on any basis whatever.[11]

Two years later—a scant thirty months before Justice Brennan

4. McAuliffe v. New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892).

5. *See* Bruff, *Unconstitutional Conditions Upon Public Employment: New Departures in the Protection of First Amendment Rights*, 21 HASTINGS L.J. 129 (1969); Note, *The Public Employee and Political Activity*, 3 SUFFOLK L. REV. 380 (1969).

6. 357 U.S. 513 (1958).

7. 374 U.S. 398 (1963).

8. 342 U.S. 485 (1952).

9. N.Y. CIV. SERV. LAW § 12-a, as amended, § 150 (McKinney 1959); N.Y. EDUC. LAW § 3022 (McKinney 1970).

10. 342 U.S. at 492.

11. For a perceptive analysis and critique of the logic of the unrestricted use of the conditioning power, see French, *supra* note 1.

took his seat—the Court, in *Barsky v. Board of Regents*,[12] upheld by a 6-3 decision the power of New York State to suspend the license of a physician for refusing to produce documents demanded by the House Un-American Activities Committee. The rationale was more revealing than the decision:

> The practice of medicine in New York is lawfully prohibited by the State except upon the conditions it imposes. Such practice is a privilege granted by the State under its substantially plenary power to fix the terms of admission.[13]

Today, of course, it is easy to see how right Justice Douglas was when he remarked, in dissent, that "nothing in a man's political beliefs disables him from setting broken bones or removing ruptured appendixes, safely and efficiently."[14] But to get the perspective of the time, it is noteworthy to recall that Chief Justice Warren voted with the majority; Justice Frankfurter was the third dissenter.

These and other cases indicate how pervasive was the vicious impact of McCarthyism in the mid-1950s. Though the Senator's fangs had been clipped somewhat, the venom was still there—as Justice Brennan himself was to find during the intense cross-examination by Senator McCarthy at the confirmation hearings in the fall of 1956. (Since these hearings took place during the pendency of several cases squarely implicating the authority of Congress to investigate subversive activities,[15] McCarthy was understandably eager to know where Brennan stood. In a remarkable display of courage and conviction, the Justice firmly refused to divulge his views on any of the cases then before the Court. He would go no further than to offer general views on public policy questions. Not only his own dignity but also the integrity of the Court as an institution were on trial that day.)

The several internal security cases in the mid-1950s did little to improve the status of government beneficiaries.[16] Essentially, the law remained little changed from the rule that Justice Holmes had enunciated in the '90s. One loyalty oath had been ruled invalid on a rather technical ground, but the vice was so patent that little could be ex-

12. 347 U.S. 442 (1954).

13. *Id.* at 451.

14. *Id.* at 474.

15. *See, e.g.*, Yates v. United States, 354 U.S. 298 (1957). Also pending, though not yet argued, were Sweezy v. New Hampshire, 354 U.S. 234 (1957); and Watkins v. United States, 354 U.S. 178 (1957).

16. *But see* Cole v. Young, 351 U.S. 536 (1956); Pennsylvania v. Nelson, 350 U.S. 497 (1956).

trapolated from the decision.[17] Meanwhile, the Court had sustained several oaths, disclaimers, qualifications and the like essentially on the grounds reflected in the *Adler* and *Barsky* decisions cited earlier. While the Warren Court had already spoken with great force on the matter of school segregation and other dimensions of civil rights,[18] remarkably little had been done to protect civil *liberties* before the 1956 Term.

II. SPEISER V. RANDALL: A MODEST START

Early in Justice Brennan's second Term, a group of cases brought to the Court a California law requiring claimants for certain property tax exemptions to submit loyalty affidavits.[19] The California constitution[20] made the exemption unavailable to persons and organizations who advocated the violent overthrow of the Government of the United States or of the State; the legislature had required the declaration of non-support as the mechanism for determining eligibility. The California Supreme Court had consistently upheld the tax exemption provisions[21] on the theory that the state's interest "in protecting its revenue raising from subversive exploitation"[22] sufficed to validate the procedure, and by analogy to public employee oaths consistently upheld by the U.S. Supreme Court in the 1950s. Justice Traynor, with the concurrence of Chief Justice Gibson, found the exemption requirement both substantively and procedurally deficient.[23] Justice Carter went even further, perceiving this case as a vehicle for a broadside attack on the whole concept of loyalty-security oaths and tests.[24]

By the time the issue reached the U.S. Supreme Court, in *Speiser v. Randall*,[25] the whole range of argument had thus been laid bare by the California Justices. If the exemption procedure was to be invalidated, three options were available. The Court could have met the

17. Wieman v. Updegraff, 344 U.S. 183 (1952).

18. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

19. CAL. REV. & TAX CODE § 32 (West 1970).

20. CAL. CONST. art. XX, § 19.

21. *See, e.g.*, First Unitarian Church v. County of Los Angeles, 48 Cal. 2d 419, 311 P.2d 508 (1957).

22. *Id.* at 438, 311 P.2d at 519.

23. *Id.* at 443, 311 P.2d at 522 (Traynor, J., dissenting).

24. *Id.* at 466, 311 P.2d at 537 (Carter, J., dissenting).

25. Although the principal case in the California courts involved tax exemption claims for church groups, the vehicle for decision in the Supreme Court was a case involving eligibility of a non-signing World War II veteran. This case played a quite minor role in the California courts, being decided on the authority of the church-exemption case.

issue head on, as the California dissenters had done, and held that states lacked power to deny tax exemption to non-oath takers. While such a bold position would probably by this time have commanded four votes—Brennan, Warren, Black and Douglas—the availability of the necessary fifth vote would have been extremely doubtful. Unless one member of the Court's conservative wing had been willing to distinguish taxpayers from other government beneficiaries, that route must have seemed closed.

There was a second alternative which might well have commanded a majority. In earlier cases, the Court had suggested that where less onerous or less restrictive means existed for the achievement of even a valid governmental objective, those means must be used in place of measures that curtailed speech or expression.[26] (Two years later the Court was to invoke this rationale explicitly in striking down an Arkansas public employee reporting requirement.)[27] California did have alternative ways of serving its constitutional goal; it might, for example, have accepted a single affidavit by each taxpayer as conclusive rather than requiring the declaration to be renewed on each year's tax form. Yet the impact of such a decision would have gone little beyond the facts of the unique California tax exemption procedure. Extrapolation to other restrictions on other governmental beneficiaries would have been problematical.

Discarding these two options, what Justice Brennan presumably sought instead was a rationale that would bring the Court together for reversal, and, at the same time, allow articulation of a principle going well beyond the facts of the case. The key to this objective lay not in substance but in procedure—the way in which the loyalty requirement shifted to the taxpayer not only the initial responsibility to file the annual declaration, but also the entire burden of proof throughout any inquiry into the claimant's loyalty. Thus, while a state might have constitutional power to deny exemptions to disloyal persons, and even to require some declaration of loyalty, it could not go as far as California had gone in placing upon the claimant the entire burden of proving his loyalty when challenged. Justice Brennan stated the position of the Court:

> Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the

26. Lovell v. Griffin, 303 U.S. 444, 451 (1938). For the development of this concept as a limitation on governmental power, see generally Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964).

27. Shelton v. Tucker, 364 U.S. 479 (1960).

> State bear the burden of persuasion to show that the appellants engaged in criminal speech. The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized.[28]

Two central premises emerged from the *Speiser* opinion. The first was a heightened solicitude for procedure in the first amendment area. No portion of the opinion has been more often cited than the passage warning that "[t]he separation of legitimate from illegitimate speech calls for more sensitive tools than California has supplied"[29]—reflecting the premise that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn."[30] In countless cases since *Speiser*, these phrases have been quoted as the basis for a holding that procedures adequate for other purposes were too crude for first amendment judgments and hence unconstitutional.[31]

The second major contribution of *Speiser* was the rediscovery and new application of the doctrine of unconstitutional conditions. Without using the terminology or citing any of the old cases involving nonresident corporations, Justice Brennan unmistakably invoked the concept when he held that government may not arbitrarily restrict access to a benefit which it is under no duty to create. For the first time in the context of individual rights and liberties, it was made clear that calling something a "privilege" did not immunize its allocation from judicial review. For the first time, too, it was clear that a "greater" power to deny outright did not always include a "lesser" power to offer upon demeaning or chilling conditions, at least where constitutional freedoms might be jeopardized.

The case was an ideal vehicle for the announcement of these principles. The benefit involved—a small tax exemption—was one over which the need for governmental control was clearly more tenuous than over public employment. Even the harshest critic would have to concede that reducing a tax bill a few dollars a year is different from putting a subversive or suspected person in a sensitive government post. Moreover, the claimant in *Speiser*—a World War II veteran—

28. 357 U.S. at 526 (citation omitted).

29. *Id.* at 525.

30. *Id.*

31. *See, e.g.*, Freedman v. Maryland, 380 U.S. 51, 58 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963); NAACP v. Button, 371 U.S. 415, 433 (1963); Marcus v. Search Warrant, 367 U.S. 717, 733 (1961).

was one whose claim to the exemption was unusually strong and whose loyalty could least readily be impugned. Thus the Court had selected for its decision a case in which the California statute appeared weakest—indeed, almost foolish—in requiring that the taxpayer prove his loyalty every April 15.

Speiser was also an appropriate vehicle because the point of entry was procedure rather than substance. Justice Brennan masterfully distinguished the two, reserving various questions about loyalty-security programs the Court was not ready to decide (and indeed did not decide until almost a decade later). Also the particular element of procedure on which the decision turned derived impeccable support from non-controversial contexts—criminal law, corporate law, evidence and other settings where courts had insisted upon a fair allocation of the burden of proof. To dispute the majority judgment, therefore, one would have had to challenge unexceptionable principles or take issue with the Court on the facts.

Before leaving *Speiser*, several limitations should be noted. Because of the alignment of the Court, Justice Brennan had to make three concessions. First, he did not decide whether California could deny a government benefit to a person or organization that advocated the violent overthrow of the Government or the support of a foreign government against the United States in the event of hostilities. (The California courts had already narrowed the reach of these provisions to exempt mere "belief" in violent overthrow, and state attorneys arguing the case further conceded that mere "abstract doctrine" would not be proscribed.)[32] In a curious way, the blurring of this issue was essential to the Brennan rationale; if government clearly lacked the power to achieve by direct means the end sought, then the whole discussion of the conditioning power would have seemed gratuitous. Thus constitutional theory blended with practical exigency to justify this partial concession.

Secondly, the Court in *Speiser* appeared to recognize priorities among benefits and beneficiaries. The State had argued for the assimilation of veterans and other covered taxpayers to public employees and union officials for whom loyalty oaths had been required with the Court's approval.[33] The Brennan opinion drew a clear distinction, however; where "a union official or public employee may be deprived

32. 357 U.S. at 519 & n.4.

33. *See, e.g.*, Garner v. Board of Pub. Works, 341 U.S. 716 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

of his position and thereby removed from the place of special danger, the State is powerless to erase the service which the veteran has rendered his country; though he be denied a tax exemption, he remains a veteran."[34] Strongly implied is a difference in the scope of state power over the loyalty of different classes or types of government beneficiaries.

This impression was confirmed by the third concession—the citation with apparent approval of the public employee and labor union loyalty cases.[35] Toward the end of the opinion, Justice Brennan suggested that the Congressional objectives in the latter cases were "thought sufficiently grave to justify limited infringement of political rights"; that "[e]ach case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety;" and that "[t]he principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public."[36] There was never an unequivocal reaffirmation of the loyalty oath cases, but a strong implication of approval. On this basis, Justice Clark was able some years later, dissenting from the striking down of the New York loyalty laws,[37] to argue that "my Brother BRENNAN himself cited [*Garner v. Board of Public Works*][38] with approval in [*Speiser*] . . . ."[39]

The claim is plausible, if a bit unfair. What changed in the interim, one suspects, was not Justice Brennan's own views on the loyalty-security issue, but the extent to which he could write those views into a majority opinion. In *Speiser*, he went as far as he could—in fact, considerably further than several colleagues who joined him realized. The opinion was a *tour de force*. Its imperfections—the three concessions of which we have spoken—can be clearly forgiven. Without those concessions, we would not have the basic principles.

III. THE CONCEPT EXPANDED: FROM SPEISER TO SHERBERT

Soon after its decision, the Court had to distinguish *Speiser*.[40]

34. 357 U.S. at 528.
35. *Id.* at 527.
36. *Id.*
37. N.Y. CIV. SERV. LAW § 12-a, as amended, § 150 (McKinney 1959); N.Y. EDUC. LAW § 3022 (McKinney 1970).
38. 341 U.S. 716 (1951).
39. Keyishian v. Board of Regents, 385 U.S. 589, 624 (1967) (dissenting opinion).
40. Cammarano v. United States, 358 U.S. 498 (1959).

A Washington State beer wholesaler named Cammarano claimed that he should be able to deduct from his income tax the costs of lobbying and publicity designed to defeat new liquor regulation laws. The Internal Revenue Service and the lower courts had consistently ruled against that position.[41] While the case was on its way to the Supreme Court, Cammarano perceived some possible relevance in the *Speiser* decision and pursued the analogy with much vigor. The Court properly gave the claim short shrift. The distinction, wrote Mr. Justice Harlan, was quite clear:

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code.[42]

Though Mr. Justice Brennan did not express his views separately, Mr. Justice Douglas did—for the purpose of endorsing the decision, and at the same time to keep open the issue whether commercial speech might ever be entitled to First Amendment protection.[43] (In 1943 the Court had held that freedom of speech and of the press did not extend to purely mercantile expression;[44] Douglas from time to time had second thoughts and wished to preserve options for the future.)

Cammarano's citation of *Speiser* served indirectly, of course, to reaffirm the earlier precedent. Justice Harlan, who might otherwise have wavered, was now on record as citing *Speiser* with approval and explaining its applicability to penalties imposed on government beneficiaries exercising first amendment freedoms. Moreover, the next year Justice Harlan indirectly strengthened the *Speiser* principle in his opinion for the Court in *Flemming v. Nestor*,[45] a case involving denial of social security benefits to a Bulgarian deported because of brief Communist Party membership in the 1930s. Although the Court rejected the deportee's claim, it did acknowledge the beneficiary's interest in fair treatment. After holding that social security benefits were not (as the district court had stated) an "accrued propery right," Justice Harlan went on to caution: "The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Pro-

41. *Id.* at 505.
42. *Id.* at 513.
43. *Id.* at 513-15 (Douglas, J., concurring).
44. Valentine v. Chrestensen, 316 U.S. 52 (1942).
45. 363 U.S. 603 (1960).

cess Clause."[46] Justice Brennan (who dissented in *Nestor*) would have said it better; he would have reminded the Court that labelling a benefit a "privilege" rather than a "right" does not define the scope of procedural safeguards. That Justice Harlan acknowledged the principle at all may indicate the degree to which *Speiser* and *Cammerano* had won his adherence.

Between 1958 and 1963, the decisions in which *Speiser* figured prominently can be grouped under several headings. First, in several cases involving freedom of the press Justice Brennan invoked *Speiser's* "sensitive tools" concept.[47] The Court struck down, in 1959, California's obscenity law which allowed a finding of guilt with no requirement of knowledge.[48] With explicit reference to *Speiser*, Justice Brennan underscored the difference betwen placement of the burden of proof in ordinary economic (and even criminal) litigation and the special sensitivity required in the First Amendment area: ". . . where we conceived that this device was being applied in a manner tending to cause even a self-imposed restriction of free expression, we struck down its application."[49] That case was followed by similar citation of *Speiser* in *Marcus v. Search Warrant*,[50] a 1961 case involving procedures for obtaining warrants to search for allegedly obscene and pornographic materials. More interesting use of the "sensitive tools" reference appeared in Justice Brennan's opinion in *Bantam Books, Inc. v. Sullivan*.[51] That case held unconstitutional Rhode Island's informal censorship system designed to discourage book dealers from carrying books found objectionable by the Commission to Encourage Morality in Youth.[52] In such cases as these, of course, we will never know what impact, if any, *Speiser* may have had on the Court majority. For Justice Brennan, as the author of the opinions for the Court, the debt to *Speiser* was clear and substantial—just as these cases afforded him continuing occasion to strengthen *Speiser* by citation.

The *Speiser* rationale was involved in the two bar admission cases decided in 1961—*Konigsberg v. State Bar of California*[53] and *In re Anastaplo*.[54] The *Konigsberg* case had been before the Court once

46. *Id.* at 611.
47. 357 U.S. at 525.
48. Smith v. California, 361 U.S. 147 (1959).
49. *Id.* at 151.
50. 367 U.S. 717, 731 (1961).
51. 372 U.S. 58, 66 (1963).
52. *Id.* at 70-71.
53. 366 U.S. 36 (1961).
54. 366 U.S. 82 (1961).

before.[55] At that time the Justices sent the case back to the state courts because it seemed the bar examiners were excluding an otherwise qualified candidate without adequate evidence of unsatisfactory character.[56] The California Bar reaffirmed its earlier action, finding the exclusion warranted by the applicant's refusal to cooperate with an inquiry into his past political activities—denying him admission, in other words, for obstruction rather than subversion.[57] In the California Supreme Court, Chief Justice Traynor argued forcefully that *Speser* now required an opposite result. A majority of his colleagues found the analogy imperfect, however, and sustained the decision of the Bar Examiners.[58]

The Supreme Court acknowledged that reliance on *Speiser* was plausible. But Mr. Justice Harlan, writing for the majority, rejected the analogy:

> It would be a sufficient answer to any suggestion of the applicability of that holding to the present proceeding to observe that *Speiser* was explicitly limited so as not to reach cases where, as here, there is no showing of an intent to penalize political beliefs.[59]

The majority did not rely solely on this distinction, however. Harlan went on to observe that, unlike the tax exemption procedure, California's bar admission inquiry did not clearly place the total burden of proof on the applicant, but only the burden of going forward with some evidence.[60]

For Justice Brennan and the other dissenters, Traynor's view of *Speiser* was clearly correct. "Under our decision in *Speiser*," Brennan argued, "the Fourteenth Amendment therefore protects Konigsberg from being denied admission to the Bar for his refusal to answer the questions . . . . And, unless mere whimsy governs this Court's decisions in situations impossible rationally to distinguish, such a procedure is indeed constitutionally required here."[61] To the author of the *Speiser* opinion, the attempt of the *Konigsberg* majority to escape its "controlling authority" was patently "specious."[62] In the compan-

55. Konigsberg v. State Bar of California, 353 U.S. 252 (1957).
56. *Id.* at 273.
57. Konigsberg v. State Bar of California, 52 Cal. 2d 769, 344 P.2d 777 (1959), *rev'd*, 366 U.S. 36 (1961).
58. 52 Cal. 2d 769, 344 P.2d 777 (1959).
59. Konigsberg v. State Bar of California, 366 U.S. 36, 54 (1961).
60. *Id.* at 55-56.
61. *Id.* at 80-81 (Brennan, J., dissenting).
62. *Id.* at 81.

ion case of *In re Anastaplo*,[63] Justices Black and Brennan both referred, in dissent, to what they deemed the controlling effect of *Speiser*; in their view Illinois, like California, had illegitimately shifted the burden of proof to the applicant to demonstrate his loyalty.[64]

The distinctions drawn by the majority were not wholly specious. *Speiser* had been ambiguous on the matter of motive, and Harlan quickly seized upon the ambiguity. By seeking to distinguish the case of the California taxpayer from that of the federal loyalty oath-taker, Justice Brennan had seemingly deferred to the judgment of Congress in requiring government employees and labor leaders to sign disclaimer oaths. There were, however, two other differences between *Speiser* and *Konigsberg-Anastaplo* that might have been invoked had Justice Harlan felt the need for more elaborate discussion. First was the difference among types of beneficiaries. The Brennan opinion in *Speiser* strongly implied that government had a stronger interest in keeping disloyal people from working for the state or heading labor unions than in denying a tax exemption to veterans.[65] Even Justice Traynor was troubled by this part of the analogy. Noting the difference between the treatment of taxpayers and civil servants in the earlier cases, Traynor observed: "Since an attorney is neither a public employee nor a taxpayer seeking an exemption, we do not know how the United States Supreme Court would resolve the constitutional issue here."[66] This distinction is plausible and, to some judges, substantial; some years later Mr. Justice Fortas drew a related distinction, suggesting that an attorney "does not have the responsibility to account to the State for his actions" and that his duties as licensee and officer of the court "do not carry with them a diminution, however limited, of his [constitutional] rights."[67]

There was one other possible distinction, clearly implied by *Speiser* but not pursued by Justice Harlan. The affidavit required by the tax exemption law was made particularly odious and onerous by its recurrence; a taxpayer loyal one year would have to declare (and might have to demonstrate) his loyalty all over again the next year. One might have said in *Konigsberg* that admission to the bar is so critical a step that when doubts arise about an applicant's loyalty he

63. 366 U.S. 82 (1961).

64. *Id.* at 111 n.8, 116 (Brennan, J., dissenting).

65. 357 U.S. at 527.

66. Konigsberg v. State Bar of California, 52 Cal. 2d 769, 777, 344 P.2d 777, 782 (1959) (dissenting opinion).

67. Spevack v. Klein, 385 U.S. 511, 520 (1967).

can be asked to dispel those doubts once and for all, with the understanding that if anyone should question his loyalty in the future the presumption would of course lie in his favor. Had the *Konigsberg* majority sought a narrow ground on which to distinguish *Speiser*, this surely would have been it. That no use was made of this factual distinction suggests that subtlety was unnecessary, that the Harlan position commanded a clear majority. While *Speiser* had by no means been confined to its facts during this period, the attempt to extend it to cover other types of government beneficiaries did not succeed.

One intriguing use of *Speiser* during this period should be recalled. In the course of his lengthy concurring opinion in the 1963 school prayer and Bible reading cases,[68] Justice Brennan came to grips with the "exemption" argument *i.e.* the claim that rights of dissenting students were protected by allowing them to be excused or exempted from religious exercises in the classroom. This contention had a superficial appeal, though applicable much more to the "free exercise of religion" issue than to the "establishment" ground on which the Court had decided.[69] After preliminary analysis, Justice Brennan suggested that *Speiser* offered a further answer. Just as the Court had held that placing the burden of proof on the taxpayer might deter clearly eligible persons from claiming the exemption,[70] so the excusal procedure might operate—especially in view of peer group pressures upon children to conform in group settings—to discourage use of the procedure by those who legitimately wished to be excused.[71] Here, then, was a new element—an emphasis upon the deterrent or "chilling" aspect of the procedures found deficient in *Speiser*. The use of the reference in this context may offer two insights into Justice Brennan's own thinking: one, that he continued to regard *Speiser* as a cornerstone of constitutional law, even though his colleagues had not yet accepted its full implications; and two, that he perceived its potential relevance for a far broader range of governmental beneficiaries than taxpayers seeking exemptions. Before the 1962 Term of the Court ended, that principle was to be more widely understood.

IV. THE IMPLICATION BECOMES EXPLICIT: SHERBERT V. VERNER

South Carolina's unemployment compensation payments, like

68. *See* School Dist. v. Schempp, 374 U.S. 203, 289 (1963) (concurring opinion).
69. *Id.* at 288.
70. 357 U.S. at 528-29.
71. 374 U.S. at 289-90.

those of most states, were offered only to persons deemed "available for work."[72] Adele Sherbert had been steadily employed for some years in a Spartanburg cotton mill. Suddenly the demand for the product increased and the mill converted to a six-day week, expecting its employees to be available for work on Saturday. Mrs. Sherbert, a Seventh-Day Adventist, refused to work on Saturdays, and was discharged. She sought other work in the area but found none that would leave her Saturdays free. The problem was not simply that communicants of her faith worshipped on Saturday, but that for Adventists, as for Orthodox Jews, labor on Saturday was forbidden.[73] Without questioning her good faith, the Employment Security Commission ruled Mrs. Shrebert ineligible for benefits, finding her not "available for work" since she would not accommodate her schedule to the demands of employers in the area.[74] Thus she was faced with a harsh choice between her faith and her livelihood. Seeking relief from the dilemma, she filed suit for a declaration of eligibility for unemployment benefits. The state courts summarily denied her claim,[75] and the issue reached the Supreme Court in the winter of 1962-63.

Mr. Justice Brennan, writing for a majority of seven, now had an opportunity to make explicit many of *Speiser's* latent premises. Three grounds of decision were available. First, the Court might have held that South Carolina could not discriminate in any way against Sabbatarians, either in the denial of benefits or in the imposition of burdens. Only two years earlier, however, the Court had sustained the Sunday closing laws against claims that such statutes abridged the free exercise of religion and amounted to an establishment of religion.[76] Unless these precedents were to be so soon overruled, that broad ground was unavailable.

Secondly, a narrow ground was potentially open to the Court. Like most states, South Carolina did provide an exemption for those who worshipped (and thus declined to work) on Sunday, but none for persons who observed a different day of rest.[77] The Court might have postponed the issue of freedom of religion by holding the distinction between Saturday and Sunday worshippers violative of the equal

72. S.C. CODE ANN. § 68-113(3) (1962).
73. Sherbert v. Verner, 374 U.S. 398, 399 n.1 (1963).
74. *Id.* at 401.
75. Sherbert v. Verner, 240 S.C. 286, 125 S.E.2d 737 (1962), *rev'd*, 374 U.S. 398 (1963).
76. Braunfeld v. Brown, 366 U.S. 599 (1961).
77. S.C. CODE ANN. § 64-4 (1962).

protection clause. This resolution would, however, have been unsatisfactory on several counts; it would have failed to decide the central constitutional issue of the case and would have risked making unsound equal protection law, since there was a crude rationality to the differentiation of Saturday and Sunday worshippers.

The middle course was thus not only the one dictated by circumstances but the one most compatible with Mr. Justice Brennan's constitutional philosophy—a philosophy cautiously advanced in *Speiser* but clearly deserving of further development and reinforcement under more auspicious conditions. Those conditions now existed, for with the appointment of Arthur Goldberg to replace Mr. Justice Frankfurter the Court at last had that critical fifth vote. Thus the time had come to reveal the full implications of *Speiser.*

After placing the case in the context of religious freedom, Justice Brennan stated his central premise: Although no criminal penalties were involved, the state agency's action "forces [Mrs. Sherbert] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[78] Such a dilemma "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[79] Lest there be any doubt about the constitutional significance of that finding, Justice Brennan then rejected the profferred right-privilege distinction: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[80] The footnote following this sentence cited many pertinent lower court cases and much of the literature concerning the doctrine of unconstitutional conditions. Then followed a lengthy summary of and quotation from *Speiser*, serving to establish the link between the two cases and the debt of the latter to the earlier.[81]

78. 374 U.S. at 404.

79. *Id.*

80. *Id.* (footnotes omitted).

81. *Id.* at 404-05 n.6. A number of lower federal and state court decisions were cited as authority for the respectability of the unconstitutional conditions doctrine. Among the most persuasive, though neglected, references was an article published in the mid-1950s by the (then) General Counsel of the Department of Health, Education and Welfare. This article reviewed the applicability of the unconstitutional conditions principle to existing conditions and restraints, including some affecting programs at that time administered by HEW. Willcox, *Invasions of the First Amendment Through Conditioned Public Spending,* 41 CORNELL L.Q. 12 (1955).

This general discussion, however, did not decide the case. It remained to determine whether some "compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right."[82] State officials had suggested there might be fraudulent claims or a flood of exemption seekers if Mrs. Sherbert's plea were accepted; but the Court found in the record no corroborative evidence. Moreover, even if there were evidence of such hazards, the "less onerous alternative" principle would require the state to prove that other methods, such as more careful investigation of doubtful claims, could not adequately serve legitimate administrative needs. It was the absence of any such evidence that distinguished this case from the Sunday closing law cases, where the Court found that a valid secular objective (a uniform day of rest) could be attained only by causing some hardship to Sabbatarians.[83] Whatever one may say about the force of this distinction, it did serve the essential and immediate function of upholding Mrs. Sherbert's claim without overruling the Sunday law cases. (Mr. Justice Stewart, who concurred separately, argued that the cases could not stand together. He, like Justice Brennan, had dissented from the Sunday law decisions;[84] unlike Brennan, Stewart now felt the time had come to overrule the Sunday law precedents.)

Justices Harlan and White, the only dissenters in *Sherbert*, clearly perceived how far the majority had gone.[85] Like Justice Stewart, they felt the Court had overruled the Sunday law cases without the courage to say so. More important, they argued that the implications of *Sherbert* for other benefit programs were very far reaching:

> The meaning of today's holding . . . is that the State must furnish unemployment benefits to one who is unavailable for work if the unavailability stems from the exercise of religious convictions. The State, in other words, must *single out* for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated.
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> . . . .
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> . . . [We] cannot subscribe to the conclusion that the State is constitutionally *compelled* to carve out an exception to its general rule of eligibility in the present case.[86]

82. Sherbert v. Verner, 374 U.S. 398, 406 (1963).

83. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 610 (1961) (dissenting opinion). In *Braunfeld*, Justice Stewart had dissented in a brief separate opinion and had joined the opinion of Mr. Justice Brennan, concurring in part and dissenting in part. *Id.* at 610-16.

84. *Id.* at 616.

85. 374 U.S. at 418-23.

86. *Id.* at 422-23.

The distinction may be mainly rhetorical. To the majority, the state must not *discriminate* in the allocation of benefits *against* those whose ineligibility reflects religious faith or belief.[87] To the dissenters the state must *provide* benefits *for* persons whose disqualifying behavior reflects religious conviction.[88] For both wings of the Court, *Sherbert* had now made explicit much that was left unstated in *Speiser*. The majority that was not available for a strong articulation of the doctrine of unconstitutional conditions in 1958 emerged in 1963. The bold strokes of *Sherbert* were the direct consequence.

V. THE FRUITS OF SHERBERT

The evolution of the doctrine of unconstitutional conditions has proceeded rapidly in the years since 1963. Both in the Supreme Court and in lower federal and state courts, the indebtedness to *Sherbert* has been substantial and direct. Two particular areas of impact can be identified for analysis here: The gradual elimination of loyalty and security oaths and disclaimers; and the insistence upon fair procedures for termination or suspension of government benefits.

The constitutional rights of government beneficiaries have nowhere been more significantly protected than through the invalidation of a series of loyalty oaths and disclaimers. By 1963, the law had changed little in this regard from the time when the court could dismiss the conscientious claims of the non-signer by suggesting he "retain [his] beliefs and associations and go elsewhere" if he did not wish to work for the state on its terms.[89] One patently overbroad oath law had been held unconstitutional,[90] and a requirement that public employees annually report their extracurricular activities had been struck down on First Amendment grounds[91]—but without overruling the earlier oath cases. It was only after *Sherbert* revealed a heightened solicitude for the constitutional liberties of public employees that the oaths began to fall.

The first case squarely to present the issue was *Baggett v. Bullitt*,[92] involving a two-part Washington State loyalty law. Justice White, an unlikely candidate to strike the first blow, wrote a bold opin-

87. *Id.* at 410.
88. *Id.* at 420.
89. Adler v. Board of Educ., 342 U.S. 485, 492 (1952).
90. Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961).
91. Shelton v. Tucker, 364 U.S. 479 (1960).
92. 377 U.S. 360 (1964).

ion relying heavily on the Brennan precedents, notably *Speiser*. "The uncertain meanings of the oaths," he began, "require the oath-taker—teachers and public servants—to 'steer far wider of the unlawful zone,' [citing *Speiser*] than if the boundaries of the forbidden areas were clearly marked."[93] Justice White went on to articulate a central principle about loyalty-security tests, deriving directly from *Speiser* and *Sherbert*:

> Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.[94]

The key to this judgment, of course, is Mr. Justice Brennan's solicitude for Mrs. Sherbert's plight. To place in proper perspective the constitutional rights of government beneficiaries, one must look not only at the challenged constraints or requirements in isolation, but also at the dilemma created by collision between that external force and the beneficiary's own belief or faith. It would no longer do (paraphrasing Justice Holmes) to say that Mrs. Sherbert has a constitutional right to be a Seventh Day Adventist but no right to receive unemployment benefits; realistically, the former without the latter was a hollow right. To make the constitutional liberty meaningful, its exercise must not cause the forfeiture of public benefits. Under these conditions, there is something very close to a constitutional right to continue to receive the benefit—unless, of course, the claimant is disqualified on some *nonconstitutional* ground.

All this may seem obvious after the fact. The point is worth developing in context of *Baggett*, however, for one simple reason: Justice White, who so forcefully expounded the Brennan philosophy in 1964 had been, less than a year before, one of the two dissenters in *Sherbert*.[95] Now he seemed to display the zeal of a convert. The defects in the Washington oath were plain enough, and could have been narrowly reached through the rationale of the 1960 public employee cases had Justice White been so inclined. That he rejected the narrow approach and wrote at length about the dilemma of the conscientious public employee anxious to retain both his principles and his pay suggests his complete acceptance of the Brennan philosophy.

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93. *Id.* at 372.
94. *Id.* (footnote omitted).
95. 374 U.S. 398, 418 (Harlan, J., dissenting).

Once the first blow had been struck, other loyalty laws fell in fairly rapid succession. While the Supreme Court invalidated oaths of Florida, Maryland, New York and Arizona,[96] the lower courts followed the lead and largely completed the task by the end of the decade.[97] The California Supreme Court, striking down the often challenged Levering Act oath in 1967,[98] relied heavily upon Justice Brennan's decisions: "It is now well settled that . . . the government may not condition public employment or receipt of such benefit upon any terms that it may choose to impose, and that the power of government to withhold benefits from its citizens does not encompass a 'lesser' power to grant such benefits upon an arbitrary deprivation of constitutional rights."[99] Later in the same opinion, the California court recognized that "conditions annexed to the publicly conferred benefit must reasonably tend to further the purposes of the government in granting the benefit, and the utility of imposing the conditions must manifestly outweigh the impairment of constitutional rights."[100] While other lower courts spoke to the point with less force and conviction, clearly by this time the message had been received. So far as public employees were concerned, substantial progress had been made by 1970 toward the recognition and protection of civil liberties.[101]

A second focus of post-*Sherbert* activity was the *procedural* right of government beneficiaries. Writing in 1968, Professor William Van Alstyne, long an expert on the subject of unconstitutional conditions, puzzled about the seemingly substantive preoccupation of the courts in

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96. Connell v. Higginbotham, 403 U.S. 207 (1971); Whitehill v. Elkins, 389 U.S. 54 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966). Alone among these cases, *Higginbotham* was decided on a narrow procedural ground, suggesting that the views of the majority of the Supreme Court had already begun to change. For a review of the 1960s, see an excellent, thorough article, Israel, *Elfbrandt v. Russell: The Demise of the Oath?*, 1966 SUP. CT. REV. 193.

97. *E.g.*, Vogel v. County of Los Angeles, 68 Cal. 2d 18, 434 P.2d 961, 64 Cal. Rptr. 409 (1967).

98. Ch. 7, § 1, [1951] Cal. Stats., 3d Ex. Sess. 1950, Vol. 1 at 15 (now CAL. GOV'T CODE §§ 3100-09) (West Supp. 1972).

99. 68 Cal. 2d at 21, 434 P.2d at 961, 64 Cal. Rptr. at 411.

100. *Id.*

101. *See generally* O'Neil, *Public Employment, Antiwar Protest and Preinduction Review*, 17 U.C.L.A. L. REV. 1028 (1970); O'Neil, *The Private Lives of Public Employees*, 51 ORE. L. REV. 70 (1971); Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 U.C.L.A. L. REV. 751 (1969); Comment, *The First Amendment and Public Employees—An Emerging Constitutional Right to be a Policeman?*, 37 GEO. WASH. L. REV. 409 (1968).

this area, to the virtual exclusion of procedures.[102] Except for one federal district court decision in Idaho, holding that one who refused to sign an oath had a right to a hearing in order to explain his recalcitrance,[103] there had been virtually no recognition of the procedural rights. Van Alstyne appropriately posed the paradox:

> If the unconstitutional conditions doctrine is sound in holding that government may not terminate or withhold benefits according to standards it is constitutionally forbidden to impose upon private citizens, then it would seem to follow that a person whose status in the public sector is threatened by administrative action should have a right to a fair hearing to make certain that the administrative action is not in fact being taken for reasons that are constitutionally improper.[104]

In other words, the absence of *procedural* safeguards, in short, might dilute and even destroy the recent *substantive* gains of government beneficiaries. Van Alstyne's view in this area, as in others, proved to be prophetic.

There had been one brief skirmish on procedural matters near the close of the decade. A Mrs. Thorpe, evicted from a North Carolina public housing project allegedly because she chaired a tenants' union, sued to gain a hearing at which she might assert her freedom of association. The Supreme Court granted review of the case,[105] but before a ruling on the merits became due, the Department of Housing and Urban Development adopted new regulations arguably requiring the sort of hearing Mrs. Thorpe requested. A remand to the lower court for such further proceedings as were mandated by the new regulations thus avoided the constitutional due process issue.[106] Mr. Justice Douglas took the occasion to touch upon the issue not reached by his colleagues:

> The recipient of a government benefit, be it a tax exemption [citing *Speiser*], unemployment compensation [citing *Sherbert*], public employment . . . a license to practical law . . . or a home in a public housing project, cannot be made to forfeit the benefit because he exercises a constitutional right.[107]

Yet even Douglas stopped short of insisting upon due process for government beneficiaries apart from substantive claims.

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102. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

103. Heckler v. Shepard, 243 F. Supp. 841, 847-52 (E.D. Idaho 1965).

104. Van Alstyne, *supra* note 102, at 1453.

105. Thorpe v. Housing Auth., 385 U.S. 967 (1966).

106. Thorpe v. Housing Auth., 386 U.S. 670 (1967).

107. *Id.* at 678-79 (footnotes omitted).

The procedural issue was squarely presented to the Court in the pair of welfare-benefit termination cases argued early in the 1969 Term.[108] The slate was no longer blank, even if the particular issue was one of first impression for the Justices. The year before, Wisconsin's wage garnishment procedure had been held unconstitutional for failure to provide adequate pre-attachment procedures, including a hearing.[109] The decision was not directly on point, of course, for the wages in question were the "property" of the recipient and not a government benefit, a fact which the Court noted clearly in the opinion.[110] Closer to the mark, a number of lower courts by this time had held that a state college or university student had a constitutional right to a hearing before being expelled or dismissed for campus infractions.[111] Indeed, by 1970, a welter of lower federal district court cases had marked out detailed contours of the student's due process interests.[112] But in the government benefit fields—including public employment—there was still no clear right to a hearing. A status could be changed, or benefits terminated, in most cases without giving *any* reason; an adverse action could be challenged on constitutional grounds only if the agency gratuitously gave a constitutionally invalid reason for the action.

The disposition of the welfare hearing cases was thus potentially critical for all government benefit fields. In *Goldberg v. Kelly*,[113] a sharply divided (5-3) Supreme Court held that due process required some sort of hearing prior to termination.[114] Mr. Justice Brennan again wrote for the Court. He began by analyzing the nature of the individual's interest:

> Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.' " Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation; or to

108. Goldberg v. Kelly, 397 U.S. 254 (1970); Wheeler v. Montgomery, 397 U.S. 280 (1970). *See generally* O'Neil, *Of Justice Delayed and Justice Denied*, 1970 SUP. CT. REV. 161.

109. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

110. *Id.* at 339.

111. *See, e.g.*, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

112. *See generally* Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969).

113. 397 U.S. 254 (1970).

114. *Id.*

> denial of a tax exemption; or to discharge from public employment.[115]

The definition of these interests did not, however, decide the case. It remained to derive a right to due process in the form of a pretermination hearing. Primary emphasis was placed upon the special plight of the welfare recipient in jeopardy: "The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it. . . ."[116] Since by definition the recipient "lacks independent resources, his situation becomes immediately desperate."[117] Moreover, several asserted countervailing interests were unpersuasive to the Court. While additional administrative expense and time might be required, the state's interest in efficiency and economy did not outweigh the individual's interest in survival.

The next year Mr. Justice Brennan wrote once again for the Court, recognizing the right to a hearing of another class of beneficiaries—holders of drivers' licenses. In *Bell v. Burson*,[118] the Court noted the essentiality of licenses for many who drive for a living, thereby analogizing the continued possession of a driving permit to the continuous receipt of welfare by the indigent person. In holding that due process required some opportunity for a hearing prior to revocation or cancellation of a license, Mr. Justice Brennan observed:

> This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' [citing *Sherbert* and *Speiser* among other cases.][119]

The course of decisions in this area had been selective and *ad hoc*. It was clear, for example, that hearings were required before attaching wages, terminating welfare payments, cancelling a driver's permit, and presumably before expelling a state college student. The status of other forms of government benefits remained in doubt. The Court was still disinclined to announce a general philosophy or principle to cover the field.

Along the way, two collateral uses of *Speiser* and *Sherbert* should be noted. When the majority of the Court struck down on broad substantive grounds a defense-facility clearance procedure,[120] Mr. Justice

115. *Id.* at 262 (citations omitted).
116. *Id.* at 265.
117. *Id.* at 264.
118. 402 U.S. 535 (1971).
119. *Id.* at 539.
120. United States v. Robel, 389 U.S. 258 (1967).

Brennan concurred specially on a somewhat narrower theory. To him the case was governed by *Speiser* and other procedural precedents, since the government had failed to provide adequate opportunity to appeal an administrative designation that triggered the mechanism.[121] Again in 1970, the Justice invoked *Speiser* to challenge a judgment of the majority that New York could demand certain associational data from applicants for admission to the bar.[122] For him and for Justice Marshall the issue was the same one that he (along with Justices Black and Douglas) had fought and lost in *Konigsberg* and *Anastaplo*: "Difficulties in proving the innocence of conduct may deter protected activity as much as a substantive standard that burdens privileged activity by its terms."[123]

One further group of decisions during the 1960s bear brief mention. Increasingly the Court invoked *Speiser* and *Sherbert* as support for the general proposition that claims to receive government benefits may not be dismissed by labelling the benefit a "privilege" rather than a "right." Such references became important in the 1969 decision invalidating the state "waiting period" or residence qualification for welfare eligibility,[124] and two years later in the sequel which struck down state denial of welfare to aliens.[125] In the latter case, Mr. Justice Blackmun (another unlikely candidate for conversion) seemed to accept the full implications of the Brennan philosophy of unconstitutional conditions. He began by arguing that the "special public interest" doctrine—under which benefits had often been withheld from aliens—"was heavily grounded on the notion that '[w]hatever is a privilege, rather than a right, may be made dependent upon citizenship.' "[126] He offered his answer:

> But this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege' [citing *Sherbert* and its progeny.][127]

On the basis of these decisions, one might have assumed the principle of unconstituional conditions to be so fully accepted by the

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121. *Id.* at 272-73 (Brennan, J., concurring).

122. Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971).

123. *Id.* at 189, n.5.

124. Shapiro v. Thompson, 394 U.S. 618 (1969).

125. Graham v. Richardson, 403 U.S. 365 (1971).

126. *Id.* at 374, quoting People v. Crane, 214 N.Y. 154, 164, 108 N.E. 427, 430 (1915).

127. *Id.*

Supreme Court that nothing could shake its grasp. This optimism, however, would have been premature.

VI. DARKENING CLOUDS: THE EROSION OF THE PRINCIPLE

Even when its hegemony was clearest, the Warren Court always stopped short of making comprehensive pronouncements about the rights of government beneficiaries as a class. There was at least an inference that certain beneficiaries would fare better than others. There was also a hint, even in the most sympathetic decisions, that certain beneficiary *interests* were entitled to greater protection than others. During the '60s, however, the Court articulated no explicit hierarchy of beneficiaries or interests.

Delineation of claims first began to emerge in the welfare hearing cases. To explain the special claim of the welfare client, Justice Brennan chacterized welfare payments as "a matter of statutory entitlement"[128]—thus implying a disparagement of benefits less explicitly secured by legislative action. He went on to suggest that "[r]elevant constitutional restraints" applied at least as much to welfare as to other contexts (public employment, tax exemptions and unemployment compensation) where the Court had vindicated beneficiary interests. The next step was a judgment that constitutional safeguards applied even more clearly to the welfare recipient than to others:

> the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits.[129]

This passage unmistakably implied a hierarchy of interests and claims. It seems doubtful that Justice Brennan would have taken this approach in *Kelly* unless circumstances made it mandatory. His own philosphy of unconstitutional conditions, from *Speiser* to *Sherbert* and beyond, has stressed the assimilation rather than the differentiation of those who receive or seek benefits from government. Speaking only for himself, he would not have held government to a lower standard in dealing with its employees than in dealing with welfare clients.

128. Goldberg v. Kelly, 397 U.S. 254, 262 (1970).
129. *Id.* at 264.

Thus one must conclude that the apparently hierarchical approach was essential to bring or keep a majority of the Court together. Had the Justice insisted that a prior hearing, or any hearing at all, for that matter, would be equally assured to all government beneficiaries, critical votes might well have been lost and with them the opportunity to establish a vital principle of due process.

In *Kelly*, as in *Speiser*, Justice Brennan therefore sacrificed the broad penumbra of the decision in order to hold the center. Concessions at the periphery were necessary to preserve the core. Where *Speiser* appeared to concede the validity of the oath cases—decisions which Justice Brennan later effectively overruled—*Kelly* appeared to establish greater rights for welfare clients than for civil servants. Just as the majority was not yet ready to go as far as Brennan would have wished to lead them in 1958, so the majority had begun to pull back, to slip away from him, by 1970.

Any doubts about the precarious quality of the *Kelly* majority are put to rest by appraising the context. In other recent cases, the Court has shown itself considerably less generous to the claims of government beneficiaries than before.[130] These decisions suggest, in fact, that *Kelly* may have gone the way it did only because procedural claims were involved; during the same Term the Court dealt somewhat less sympathetically with the substantive concerns of welfare clients.[131] Indeed, in recent cases the Court has begun to imply a double standard for substance and procedure in the government beneficiary setting.[132]

The clearest evidence of an eroding majority came in *Wyman v. James*,[133] a year after *Kelly*. There the Court held that a welfare recipient's benefits could be terminated for refusing to allow a caseworker to enter the home for regular inspections.[134] The majority's approach to the constitutional claims of privacy went well beyond the immediate question of the case. When the recipient argued that requiring her to open her doors to the caseworker imposed an unconstitutional con-

130. *See, e.g.*, Cole v. Richardson, 405 U.S. 676 (1972), the first case argued and decided on the merits which sustained the constitutionality of a state loyalty oath since the early 1950s.

131. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970), upholding state "maximum grants" or "flat grants" as ceilings on family welfare payments.

132. *See, e.g.*, Connell v. Higginbotham, 403 U.S. 207 (1971).

133. 400 U.S. 309 (1971).

134. *Id.* at 326.

dition on welfare, Mr. Justice Blackmun replied that the situation was analogous to that of a taxpayer who refused to produce proof of challenged deductions and thus had to pay a higher income tax. "So here Mrs. James has the 'right' to refuse the home visit, but a consequence in the form of cessation of aid, similar to the taxpayer's resultant additional tax, flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved."[135]

Justice Blackmun's view of Mrs. James and her privacy is strikingly reminiscent of Justice Holmes' view of Officer McAuliffe and his politics.[136] The dissenters in *James* immediately perceived the grave implications of this judgment for the *Speiser-Sherbert* framework and the whole concept of unconstitutional conditions. Justice Douglas argued with concern:

> If it was unconstitutional in *Speiser* to condition a tax exemption on a limitation of freedom of speech, it was equally unconstitutional to withhold a social security benefit conditioned on a limitation of freedom of association. [The reference is to *Flemming v. Nestor*,[137] the case of the deported Bulgarian Communist discussed earlier.] A right-privilege distinction was implicitly rejected in *Speiser* and explicitly rejected in *Sherbert*. Today's decision when dealing with a state statute joins *Flemming* as an anomaly in the cases dealing with unconstitutional conditions.[138]

In a separate dissent, Mr. Justice Marshall, joined by Mr. Justice Brennan, echoed the alarm:

> In [*Sherbert*,] this Court did not say 'Aid merely ceases. There is no abridgement of religious freedom.' Nor did the Court say in [*Speiser*] . . . 'The tax is simply increased. No one is compelled to relinquish First Amendment rights.'[139]

These concerns were certainly warranted by the language if not the precise holding of the *James* majority. Indeed, Mr. Justice White —never an unqualified supporter of unconstitutional conditions despite his strong *Baggett* opinion—refused to join that part of the Blackmun opinion which dealt with this issue and analogized Mrs. James to an aggrieved income taxpayer. While the majority had not gone the full distance back to the archaic and insensitive language of the early '50s, the partial reversion was apparent to all.

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135. *Id.* at 324.
136. *See* n.4, *supra*, and accompanying text.
137. 363 U.S. 603 (1960).
138. 400 U.S. at 329-30, n.8 (1971) (Douglas, J., dissenting).
139. *Id.* at 345 (Marshall, J., dissenting) (footnotes omitted).

CONCLUSION

This is an uneasy time to be writing about unconstitutional conditions. In 1959 or so, we could have said that Justice Brennan had propounded a vital new doctrine which, if carried to its full potential, would bring a new measure of justice and dignity to persons who depend upon government aid or support. In the middle of the last decade, after *Sherbert* and the earliest oath cases, one would have recognized the very substantial fulfillment of that potential—a virtual revolution in the status of recipients of public largesse or employment. Writing in 1970, after *Kelly,* one would have sensed trouble in the offing—not because the case came out as it did but because Justice Brennan felt compelled to make concessions of a kind he had not made since 1958. These concessions are not like the Justice. In this area, as much as any other, he has been a fighter deeply committed to principle. He has never lost an opportunity to press for better safeguards for government beneficiaries. It is for precisely this reason that in 1970, as in 1958, at the end of the cycle as at the beginning, the Justice settled for less than he would have liked. But the basic and central principle is unsullied in the process. Government beneficiaries are no less in his debt because his sense of justice and humanity is tempered with pragmatism.